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VIA ELECTRONIC MAIL AND U.S. MAIL

Mr. Albert Kiss
Office of General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Supplement to
AOR 2004-29

Re: Additional Information Regarding Advisory Opinion Request 2004-29,
Rep. Todd Akin and Akin for Congress

Dear Mr. Kiss:

This is to follow up on our previous telephone conversations regarding the Advisory Opinion Request 2004-29 ("AOR") of Congressman Todd Akin (R-MO). Pursuant to our conversation(s), the Federal Election Commission ("FEC" or "Commission") has deemed the AOR submitted by Rep. Akin complete and is undertaking the necessary steps to respond to the AOR. However, by agreement, we are proceeding on the normal timeline established by 11 C.F.R. §112.4(a) and we have withdrawn our earlier request for expedited review pursuant to 11 C.F.R. §112.4(b).

To confirm, the questions asked in the AOR are not rendered moot by the passage of time, in particular, by virtue of the Missouri primary election having been conducted earlier this week. To address that concern, we provide the following additional information and revise the questions submitted as follows below:

1. Is it permissible under the Act, specifically 2 U.S.C. §§439a, for Rep. Todd Akin to make direct contributions from campaign funds received by Todd Akin for Congress to a ballot committee established to support the Defense of Marriage Amendment, to a committee established for the purpose of opposing the Gambling Amendment or to any other ballot committee established pursuant to Missouri law?

Additional information: Ballot committees are established pursuant to Missouri law, specifically MO. REV. STAT §130.011 (2003), which defines such ballot committees as either 'campaign committees', which are established for a *single* ballot question (see MO. REV. STAT. §130.011(8) or as 'continuing committees', which support one or more ballot questions on an ongoing basis (see MO. REV. STAT. §130.011(10)). Ballot committees established for the purpose of proposing, supporting or opposing ballot questions in the State of Missouri are not established under 26 U.S.C. §501(c)(3) of the Internal Revenue Code because their major purpose includes grassroots lobbying as defined by the IRS.

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Such committees may be formed as political committees (26 U.S.C. §527) with registration and reporting responsibilities to both the State of Missouri and the Internal Revenue Service, or are sometimes formed as 'social welfare' lobbying and grassroots non-profit organizations pursuant to 26 U.S.C. §501(c)(4) with registration and reporting to the State of Missouri under its campaign finance laws.

None of these ballot committees are registered as federal political committees under the Act, because they are not formed for the purpose of influencing a federal election, nor do the committees make expenditures for the purpose of influencing a federal election of the minimum amount necessary to trigger registration with the Commission under 11 C.F.R. §100.5.

Members of Congress, including Rep. Akin, have been and continue to receive requests to contribute funds from their campaign accounts to ballot committees. It is important for Members of Congress to know whether such contributions are permissible uses of campaign funds pursuant to 11 C.F.R. §113.1 and §113.2, inasmuch as ballot committees are regularly established legal entities in Missouri and other states which permit the initiative process¹. The Commission's responses to the questions posed in AOR 2004-29 impact many members of Congress in addition to Rep. Akin.

2. Is it permissible under the Act, specifically 2 U.S.C. §441i(e) for Rep. Akin to solicit contributions for Todd Akin for Congress with the stated purpose in the solicitation that funds received may be used to support passage of the Defense of Marriage Amendment or to oppose the Gambling Amendment, or any other ballot question which may appear on the ballot in any special or regularly scheduled election in Missouri?

Additional Information: As with the response concerning Question #1, the rise and existence of ballot committees to propose, support or oppose ballot questions that appear on Missouri ballots is an ongoing occurrence in the State of Missouri. Rep. Akin requests the Commission's guidance as to whether he may solicit contributions to his campaign with the stated purpose of contributing such funds to one or more ballot committees in the State of Missouri.

3. Is it permissible under the Act for Rep. Akin to appear in newspaper, radio or television ads paid for by Missourians for Marriage, the Coalition to Protect Marriage in Missouri or any other registered ballot committee in Missouri? Does it make a difference if Todd Akin for Congress has contributed campaign funds to the committee sponsoring the ads?

¹ There are twenty-three (23) states where lawmaking by citizens is allowed via the initiative process, some of which are restricted to constitutional amendments only, others of which allow both constitutional and statutory changes via the initiative process: Alaska, Arkansas, Arizona, California, Colorado, Florida, Idaho, Massachusetts, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming. Citizens in four (4) additional states are allowed a variation on the form of initiative lawmaking: Illinois, Maryland, New Mexico and Kentucky.

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Additional information:

A consideration giving rise to Rep. Akin's question(s) regarding ballot committees is whether his appearance in public communications paid for by a ballot committee constitutes an 'expenditure' for purposes of the Act, such as to trigger the registration, filing with and reporting to the Commission by a state ballot committee as a political committee within the definitions of 11 C.F.R. §100.5.

Organizers of ballot committees have requested Rep. Akin's involvement in their activities including appearances in advertisements and other public communications to support or oppose ballot questions. These requests are not limited only to the specific questions considered at the August 3, 2004 primary election, but include ongoing requests for assistance in the manner discussed in the questions posed by the AOR.

For instance, there is one ballot question already certified for the November 2, 2004 general election ballot to amend the Missouri Constitution on the issue of taxation, to-wit:

Official Ballot Title
Constitutional Amendment 3

(Proposed by Initiative Petition)

Shall the Missouri Constitution be amended to require that all revenues from the existing motor vehicle fuel tax (less collection costs) be used only for state and local highways, roads and bridges, and also require that vehicle taxes and fees paid by highway users be used only for constructing and maintaining the state highway system (less collection costs, refunds and highway patrol law enforcement costs), except that up to half of such vehicle taxes and fees, phased in over four years, will go into a state road bond fund to repay state highway bonds?

Additionally, there are presently sixteen (16) initiative petitions certified by the Secretary of State of Missouri for circulation on various topics, including gambling, changes to the electoral college and taxation, among others. Those petitions are now actively being circulated. Rep. Akin will be actively involved in several of these issues should any be certified for appearance on the ballot at the November 2, 2004 general election or another statewide election in 2005 or 2006. The questions posed by Rep. Akin are important not only as they are related to the Defense of Marriage Amendment but also the other issues that are making their way to the statewide ballot in Missouri via the initiative process.

You have inquired as to the extent of Rep. Akin's involvement with the ballot committee insofar as the script, language, or other content of advertising that would feature Rep. Akin. While Rep. Akin will retain control over his appearance in any radio or television advertisement and would also either submit to the ballot committee or, alternatively, would review and approve any statement to be attributed to him for inclusion in advertising by the ballot committee, Rep. Akin would otherwise have no involvement in, control over or substantial discussions or material involvement regarding other aspects of advertisements by the ballot committee, i.e., placement, duration, frequency, etc.

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4. Is it permissible under the Act for Rep. Akin to personally appear in television, radio, or newspaper advertisements or other public communications in support of the Defense of Marriage Amendment, the Gambling Amendment or any other ballot questions where such advertisements are both sponsored and paid for by Todd Akin for Congress, are independent of any other committee or candidate and which appear in media markets that include areas both within and outside of his congressional district? Must the script for such an advertisement include a reference to Rep. Akin's candidacy for reelection or is a reference to his position as a member of the United States House of Representatives sufficient?

Additional Information: The question(s) regarding the Defense of Marriage Amendment are pertinent to *all* ballot questions that are certified or which may be certified in the future to appear on the Missouri ballot, namely, may Rep. Akin personally appear in television, radio or other public advertising or communications in which Rep. Akin's campaign funds are used to pay for the public communications? And is it significant whether Rep. Akin's appearance(s) in such public communications are limited in terms of the media markets in which such advertisements can be broadcast or geographically in terms of where a newspaper advertisement, solicitation or public communication is allowed to appear?

You have asked whether the script for such advertisements would be prepared in coordination with the ballot committee organizers. Assuredly, while such communications may be generated at the request of ballot committee organizers, Rep. Akin would retain ultimate control over the content and scripts of such communications in all instances in which his campaign funds would be used to pay for the communications.

5. We have deleted previously submitted Question 5 and incorporated it into Question 4 above.

Additional Information. It should be noted that one of the initiative petitions presently certified and being circulated now for submission to a vote of the people of Missouri is on the subject of the expansion of floating gambling casinos in Missouri. Rep. Akin has long been a state leader opposing the expansion of gambling in any form in Missouri and will be actively involved in opposing this petition and ballot question at any election in which it is certified to appear.

6. Is it permissible under the Act for Rep. Akin to make direct contributions from Todd Akin for Congress funds to candidates for state and local office in the State of Missouri as a further means of supporting these issues?

Additional Information: Rep. Akin has contributed this election cycle funds from his campaign (Todd Akin for Congress) to state candidates in Missouri, prior to being advised that changes in the Act under BCRA require the Commission's guidance in order to be assured that such contributions from his campaign funds are permissible. Rep. Akin seeks the Commission's Advisory Opinion on this question and further, in the event the Commission advises that such contributions are not permissible under the Act as amended by BCRA, is it required that Rep. Akin seek and obtain a refund of his prior contributions?



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We trust that this additional information is helpful in the Commission's response to the AOR previously submitted. Please contact me at (202) 295-4081 if you require further information.

Thank you for your assistance and response.

Sincerely,

/s/ Cleta Mitchell

Cleta Mitchell, Esq.
Counsel for Rep. Todd Akin and Akin for Congress

cc: The Honorable Todd Akin